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IN THE

Supreme Court of the United States

October Term, 1962

No. [redacted] 35

ISRAEL DRESNER, AUSTIN M. WARNER,
ROBERT M. BROWN, PETTY D. McKINNEY,
MARTIN FREEDMAN, ARTHUR L. HARDGE,
ROBERT J. STONE, WAYNE C. HARTMIRE,
J. W. COLLIER, JR., RALPH L. ROY,

Petitioners,

vs.

CITY OF TALLAHASSEE,

Respondent.

PETITIONERS' REPLY BRIEF

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ARGUMENT

INTRODUCTION

Respondent's contention that the Supreme Court of the United States lacks jurisdiction of this cause under 28 U.S.C. §1257 is without merit.

Petitioners were convicted in the Municipal Court of the City of Tallahassee and judgment was affirmed on appeal by the Circuit Court of the Second Judicial

Circuit of Florida. Petitioners seek a Writ of Certiorari to that Circuit Court as the highest court of the State in which a decision could be had.

Respondent concedes that the said Circuit Court has "final appellate jurisdiction" of the instant case under Article V, §6(3) of the Constitution of Florida, but asserts that further review of the instant case may be had at the discretion of the Supreme Court of Florida and the District Courts of Appeal of Florida through their power to issue common law Writs of Certiorari. (Resp. Br. pp. 3-8).

Petitioners will demonstrate the untenability of Respondent's position with two clear and definitive principles of law: first, the Florida common law Writ of Certiorari is limited in its application and does not provide **full review** of the cause involved; second, the power of **full review** by a higher State court is required to prevent this Court from having jurisdiction.

I. THE FLORIDA COMMON LAW WRIT OF CERTIORARI DOES NOT PROVIDE FULL REVIEW BY A HIGHER COURT BUT IS LIMITED TO DETERMINING WHETHER THE LOWER COURT HAS EXCEEDED ITS JURISDICTION OR PROCEEDED TYRANNICALLY WITHOUT REGARD TO ESSENTIAL REQUIREMENTS OF LAW.

The Circuit Court has "final appellate jurisdiction . . . of all cases arising in Municipal Courts . . . " (Constitution of Florida, Article V §6[3]).

There are "higher" courts in Florida — the District Courts of Appeal and the Supreme Court of Florida—each of which has appellate jurisdiction of trial courts **other** than Municipal Courts and each of which also may issue "all Writs necessary or proper to the complete exercise of its jurisdiction." (Constitution of Florida, Article V, §§5 and 4 respectively).

In the instance of the District Courts of Appeal of Florida, at least, the power to issue common law Writs of Certiorari to inferior tribunals, when they proceed in a cause without jurisdiction or when their procedure is not according to the essential requirements of law, is granted or preserved.

It is the existence of this power in the District Courts of Appeal of Florida that has led Respondent to suggest that the Supreme Court of the United States lacks jurisdiction to issue its Writ of Certiorari to the Circuit Court as the "highest court of the State in which a decision could be had." Respondent even states in its Brief that Petitioners must seek relief from the District Court of Appeal and then from the Supreme Court of Florida before jurisdiction lies in the Supreme Court of the United States to issue a Writ of Certiorari. (Resp. Br. p. 8) Such a conclusion, of course, emasculates the orderly system of intermediate appellate jurisdiction provided by the Florida Constitution, and establishes the Supreme Court of Florida as the sole "highest court" under 28 U.S.C.A. 1257 in every case—thereby depriving the federal statute of meaning as well as the state constitution.

The fallacy inherent in Respondent's suggestion becomes apparent when it is noted that the common law

Writ of Certiorari does not constitute a method of reviewing the proceedings below.

In State v. Katz, Fla. App., 108 So.2d 60 (1959), the District Court of Appeal of Florida, Third District, had before it a Petition for Certiorari to review the action of a Circuit Court reversing a misdemeanor conviction in a Court of Crimes, and made the following pertinent determination:

> "The Constitution confers upon the Circuit Courts 'final appellate jurisdiction in all civil and criminal cases arising in the County Court, or before County Judges' Courts, of all misdemeanors tried in Criminal Courts of Record, and of all cases arising in Municipal Courts, Small Claims Courts, and Courts of Justices of the Peace.' Constitution of Florida, Article V, Section 6 (3), 26 F.S.A.
>
> **"Due regard for the plain language of the Constitution prevents this appellate court from entertaining a second appeal. The common law Writ of Certiorari was not meant for and may not be diverted to such purpose.** See Townsend v. State, Fla. App. 1957, 97 So.2d 712, 713; 5 Fla. Jur., Certiorari, Section 25. On such certiorari we must restrict our consideration within those limits which have been well defined by the Supreme Court.
>
> "In Benton v. State, 74 Fla. 30, 76 So. 341, 342, it was held that as to those cases where the Constitution afforded final appellate jurisdiction in

the Circuit Courts, certiorari to the Supreme Court could not be used for a second appeal, nor to produce the merits for review as on appeal; that in such circumstances the Writ may not be used to review and affirm or reverse the order of the Circuit Court made in the exercise of its granted (final) appellate jurisdiction, but calls for an order which 'must either quash the proceeding of the Judge of the Circuit Court, or quash the certiorari which brings it here.

"In American Ry. Express Co. v. Weatherford, 84 Fla. 264, 93 So. 740, 741, 742, the Supreme Court, in an opinion by Mr. Justice Whitfield, concisely defined the nature and scope of the common law Writ of Certiorari, as follows:

"'Certiorari is a common-law writ which issues in the sound judicial discretion of the court to an inferior court, not to take the place of a writ of error or an appeal, but to cause the entire record of the inferior court to be brought up by certified copy for inspection, in order that the superior court **may determine from the face of the record whether the inferior court has exceeded its jurisdiction, or has not proceeded according to the essential requirements of the law**, in cases where no direct appellate proceedings ar provided by law. Seaboard Air Line R. Co. v. Ray, 52 Fla. 634, 42 So. 714.'

"In Brinson v. Tharin, 99 Fla. 696, 127 So. 313, 316, dealing with the office and scope of a Writ of Certiorari directed to an order of the

Circuit Court acting as an appellate court, the Supreme Court said:

> "'The writ, confined to its legitimate scope, may issue within the court's discretion at any time to correct the procedure of courts wherein they have not observed those requirements of the law which are deemed to be essential to the administration of justice. It is important, however, that the court should not broaden or extend the scope of the writ.
>
> "'**A judgment void for lack of jurisdiction or a proceeding characterized by a kind of tyranny in the failure to observe essential requirements should be subject to correction at the discretion of the court vested with the power to issue the writ.**
>
> "'* * * * *
>
> "'The common-law Writ of Certiorari cannot be made to serve the purpose of an appellate proceeding in the nature of a writ of error. The writ involves a limited review of the proceedings of an inferior jurisdiction. **It is original in the sense that the subject-matter of the suit or proceedings which it brings before the court are not here reinvestigated, tried, and determined upon the merits generally as upon appeal at law or writ of error.** Basnet v. City of Jacksonville, 18 Fla. 523'." (pp. 61-2, Emphasis supplied.)

In **State v. Smith**, Fla. App., 118 So.2d 792 (1960), the District Court of Appeal of Florida, First District, had before it a Petition for Certiorari to review a judgment of a Circuit Court reversing a judgment of conviction of a County Judge's Court. The respondent was riding in an automobile owned by one of the occupants when wildlife officers stopped them, searched the car without a warrant and then placed all persons under arrest for taking a doe deer contrary to law. Timely motion to suppress, made by all defendants, was overruled and convictions followed. On appeal, the Circuit Court, in full review of the proceedings, found no probable cause existed to search the vehicle without a warrant and prior to arrest; therefor, the convictions of both the owner and the respondent-passenger were reversed. On Petition for Certiorari from the District Court of Appeal to the Circuit Court, the petitioner contended that the Circuit Court's determination as to the respondent, as an **occupant** of the vehicle, departed from the essential requirements and the settled principles of law in that only persons whose rights had been invaded could invoke the constitutional guarantee against unlawful search and seizure. The District Court of Appeal found that the Circuit Court had **erred**:

> "Generally an accused cannot protest a wrongful search and seizure of premises and property which he does not own or lease or lawful occupy or possess or in which he has no interest. The applicability of this rule to occupants of motor vehicles who are mere invitees was precisely passed upon by this court in the Cameron case in which the general rule above

stated was followed. [Cameron v. State, Fla. 1959, 112 So.2d 864]"

But the Court stated:

"Regardless of the correctness of the State's position on the proposition of law presented by its petition for certiorari, we cannot agree that the writ should issue and the Circuit Court's judgment be quashed.

"As to those cases where the Constitution affords final appellate jurisdiction in the Circuit Courts, certiorari may not be used in this court for the purpose of securing a second appeal, nor to produce the merits for review on appeal. The writ may not be used to review and affirm or reverse the judgment of a Circuit Court made in the exercise of its final appellate jurisdiction, but requires that the judgment be either quashed, or the writ of certiorari dismissed.

"Certiorari is a common-law writ which issues in the sound judicial discretion of the court to an inferior court, not to take the place of an appeal, but to cause the entire record of the inferior court to be brought up in order that it may be determined from the face thereof whether the inferior court has exceeded its jurisdiction, or has not proceeded according to the essential requirements of law. Confined to its legitimate scope, the writ may issue within the court's discretion to correct the procedure of courts wherein they have not observed those requirements of

> the law which are deemed to be essential to the administration of justice. It is important, however, that the court should not broaden or extend the scope of the writ. A judgment void for lack of jurisdiction, or a proceeding characterized by a complete failure to observe essential requirements of law is subject to correction at the discretion of the court vested with the power to issue the writ. Failure to observe the essential requirements of law means failure to accord due process of law within the contemplation of the Constitution, or the commission of an error so fundamental in character as to fatally infect the judgment and render it void. Certiorari is confined to a limited review of the proceedings of an inferior jurisdiction. **It is an original action in the sense that the subject matter of the suit or proceedings which it brings before the court are not there reinvestigated, tried and determined upon the merits generally as upon an appeal.**" (pp. 794-5, Emphasis supplied).

In **Cast-Crete Corp. v. Prater**, Fla. App., 134 So.2d 813, 815 (1961), the District Court of Appeal held that the Writ of Certiorari may not be employed "to re-weigh or to re-evaluate evidence."

One instance in which the common law Writ of Certiorari was granted by a District Court of Appeal to a Circuit Court quashing its judgment affirming convictions entered in a Municipal Court is found in **Aguilera v. City of Miami**, Fla. App., 115 So.2d 421 (1959), wherein

the Court corrected "a judgment void for lack of jurisdiction" and held:

> "It conclusively appears that Aguilera could not have been guilty of the charges of disturbing the peace of the City of Miami by the possession of property in her home in the City of Coral Gables. **The Municipal Court of the City of Miami lacked the jurisdiction to try her** for an offense allegedly committed outside its city boundaries. The Circuit Judge departed from the essential requirements of law when he confirmed the conviction upon charges over which the Municipal Court had no jurisdiction." (p. 422, Emphasis supplied).

II. THE FACT THAT STATE LAW PROVIDES FOR RELIEF FROM A LOWER STATE COURT JUDGMENT BY SUBSEQUENT AND DISTINCT PROCEEDINGS **NOT IN THE NATURE OF A FULL REVIEW** OF THE LOWER COURT'S JUDGMENT DOES NOT RENDER THE LOWER COURT NOT THE "HIGHEST COURT OF THE STATE IN WHICH A DECISION COULD BE HAD".

The "supervisory" power of the District Courts of Appeal of Florida to issue common law Writs of Certiorari to Circuit Courts acting in their "final appellate jurisdiction" does not establish the District Courts of Appeal as "the highest" courts under 28 U.S.C.A. §1257. To conform to the statutory meaning of that term, a court must provide opportunity for a **full review** of the merits of the case. The power to issue the so-called com-

mon law Writs of Certiorari or review is well nigh universal by "higher" courts to intermediate appellate courts of final jurisdiction. Moreover, the legal arsenal available to litigants in every State provides some means of collateral attack on "final" judgments of intermediate appellate courts, including habeas corpus, coram nobis and other related, independent, and sometimes original proceedings. Nevertheless, the existence of these remedies does not deprive the intermediate court of final appellate jurisdiction from being the "highest court" and the Supreme Court of the United States in numerous instances has reviewed final appellate judgments of intermediate State appellate courts. **Woods v. Nierstheimer**, 328 U.S. 211, 66 S.Ct. 996, 90 L.Ed. 1177 (1946); **Tucker v. Texas**, 326 U.S. 517, 66 S.Ct. 274, 90 L.Ed. 274 (1946); **Thompson v. Louisville**, 362 U.S. 199, 80 S.Ct. 624, 4 L.Ed.2d 654 (1960); **Jamison v. Texas**, 318 U.S. 413, 63 S.Ct. 669, 87 L.Ed. 869 (1943); **Largent v. Texas**, 318 U.S. 418, 63 S.Ct. 667, 87 L.Ed. 873 (1943); and **Talley v. California**, 362 U.S. 60, 80 S.Ct. 536, 4 L.Ed.2d 559 (1960).

In **Largent v. Texas**, 318 U.S. 418, 63 S.Ct. 667, 87 L.Ed. 873 (1943), this Court held it had jurisdiction even though the appellant had a further method of review under Texas law by a **higher** State court, i.e., by habeas corpus, because such method of review did not permit **full** review of the cause. Appellant was originally convicted in a Texas Municipal Court of violating an ordinance by offering books for sale without a permit granted at the municipal officer's discretion; appellant appealed to the County Court where a trial de novo was had and motions to quash the complaint because the ordinance violated the Fourteenth Amendment were overruled. The Supreme Court of the United States had previously

"requested counsel to discuss whether this judgment could be **fully reviewed** on this record by a higher state court by habeas corpus or other proceeding." (at 318 U.S. 421, 63 S.Ct. 668; emphasis supplied). In its opinion assuming jurisdiction and reversing the judgment below, the Supreme Court of the United States noted that Vernon's Tex. St. 1936 Art. 53 (Code Criminal Procedure) explicitly gave the County Court final appellate jurisdiction since the fine did not exceed one hundred dollars, and relied on **Ex parte Largent**, 162 S.W.2d 419 (Tex. Cr. App. 1942), for the Texas rule that habeas corpus did not constitute a "method for reviewing the conviction of appellant" so as to deprive this Court of jurisdiction:

> "The appellant, under Texas practice, apparently could test by habeas corpus the constitutionality on its face of the ordinance under which she was convicted but may not use that writ to test the constitutionality of the ordinance as applied to the act of distributing religious literature. Since there is by Texas law or practice, no method which has been calld to our attention for reviewing the conviction of appellant, on the record made in the county court, we are of the opinion the appeal is properly here under Section 237(a) of the Judicial Code. The proceeding in the county court was a distinct suit. It disposed of the charge. **The possibility that the appellant might obtain release by a subsequent and distinct proceeding, and one not in the nature of a review of the pending charge, in the same or a different court of the State does not affect the finality of the existing judgment or the fact that this judgment was obtained in the highest**

state court available to the appellant." (318 U.S. 421, 422, 63 S.Ct. 669; emphasis supplied)[1]

Similarly, in **Tucker v. Texas**, 326 U.S. 517, 66 S.Ct. 274, 90 L.Ed. 274 (1946), this Court held as follows:

> "The appellant was charged in the Justice Court of Medina County, Texas, with violating Article 479, Chap. 3 of the Texas Penal Code, which makes it an offense for any 'peddler or hawker of goods or merchandise' wilfully to refuse to leave premises after having been notified to do so by the owner or possessor thereof. The appellant urged in his defense that he was not a peddler or hawker of merchandise, but a minister of the gospel engaged in the distribution of religious literature to willing recipients. He contended that to construe the Texas statute as applicable to his activities would, to that extent, bring it into conflict with the Constitutional guarantees of freedom of press and religion. His contention was rejected and he was convicted. On appeal to the Medina County Court, his Constitutional contention was overruled. **Since he could not appeal to a higher state court this appeal under Sec. 237(a) of the Judicial Code, 28**

[1]In Ex parte Largent, supra, the Texas court interpreted Article 53 as not permitting habeas corpus by the Court of Criminal Appeals to review *facts* since such review would actually be an appeal. Thus, the court held, habeas corpus (defined in Vernon's Texas Code of Criminal Procedure Art. 113 and grantable by Courts of Criminal appeals, district courts, county courts, or any judges thereof under Art. 117) could only be used when attacking an ordinance *on its face* since an attack upon the ordinance *as applied* would necessitate proof of its wrongful application in that the *facts* did not support the judgment of conviction.

U.S.C. 344(a), 28 U.S.C.A. §344(a) is properly before us, Largent v. Texas, 318 U.S. 418, 63 S.Ct. 667, 87 L.Ed. 873." (p. 274, emphasis added).

See also **Jamison v. Texas,** 318 U.S. 413, 63 S.Ct. 669, 87 L.Ed. 869 (1943).

Cases arising in California are particularly illuminating for the reason that the California judicial system is almost identical to that of Florida. The jurisdiction of the California Superior Courts is set forth in Article VI, Section 5, of the California Constitution as follows:

> "The Superior Courts shall have appellate jurisdiction in such cases arising in Municipal and in Justices' and other inferior courts in their respective counties or cities and counties as may be prescribed by law. The Legislature may, in addition to any other appellate jurisdiction of the Superior Courts, also provide for the establishment of appellate departments of the Superior Court in any county or city and county wherein any Municipal Court is established, and for the constitution, regulation, jurisdiction, government and procedure of such appellate departments."

The jurisdiction of the Supreme Court of California in part, is set forth in Article VI, Section 4, of the California Constitution as follows:

> " . . The said [Supreme] court shall also have power to issue writs of mandamus, certiorari, prohibition, and habeas corpus, and all other writs necessary or proper to the complete exercise of its appellate jurisdiction."

The jurisdiction of District Courts of Appeal of California in part is set forth in Article VI, Section 4b, of the California Constitution as follows:

> " . . . The said [District] courts [of appeal] shall also have power to issue writs of mandamus, certiorari, prohibition and habeas corpus, and all other writs necessary or proper to the complete exercise of their appellate jurisdiction."

The following cases sustain the power of courts "higher" than the Superior Courts in California to issue writs of certiorari to that court:

> **Redlands High School District v. The Superior Court of San Bernardino County**, 20 Cal.2d 348, 125 Pac.2d 490;
>
> **Auto Equity Sales, Inc. v. The Superior Court of Santa Clara County**, 57 Cal.2d 450, 20 Cal. Rep. 321, 369 Pac.2d 937;
>
> See also, **Fortenbury v. The Superior Court of Los Angeles County**, 16 Cal.2d 405, 106 Pac.2d 411.

In **Talley v. California**, 362 U.S. 61, 80 S.Ct. 536, 4 L.Ed.2d 559, the defendant was convicted in the Municipal Court of Los Angeles for violating a municipal ordinance making it an offense to distribute handbills not bearing the names and addresses of the distributors. The Superior Court affirmed on appeal. Thereafter, Talley made application to the United States Supreme Court for a

Writ of Certiorari to the Superior Court of the County of Los Angeles. This Court stated:

> "Since this was the highest State court available to petitioner, we granted certiorari to consider this constitutional contention." 4 L.Ed.2d at 561.

In other cases, the United States Supreme Court has ruled that the Superior Courts of California are the highest courts of the State in which a decision could be had under the provisions of 28 U.S.C. 1257 when such court acted in its appellate jurisdiction. **Smith v. California,** 361 U.S. 147, 149, 80 S.Ct. 215, 4 L.Ed.2d 205, 208; **Edwards v. California,** 314 U.S. 160, 171, 62 S.Ct. 164, 86 L.Ed. 119, 124; **Robinson v. California,** 370 U.S. 660, 82 S.Ct. 1417 (1962), 8 L.Ed.2d 758.

The cases of **Stratton v. Stratton,** 239 U.S. 55, 36 S.Ct. 26, 60 L.Ed. 142, and **Matthews v. Huwe,** 269 U.S. 262, 46 S.Ct. 108, 70 L.Ed. 266, cited in the Respondent's Brief (p. 4) are distinguishable from the cases herein cited as well as the case at Bar for the reason that the Ohio Supreme Court has power, under the Ohio Constitution and laws, to review in every case judgments or decrees of the Courts of Appeals of Ohio where, in the exercise of its judgment, the Ohio Supreme Court deems them to be of such public or great general interest as to require review; therefore, the Supreme Court of Ohio was the highest court in which a **full decision** on the merits of any particular case could be had. In **Stratton, supra,** the United States Supreme Court held that for it to assume jurisdiction without a previous application for review having been made to the Ohio Supreme Court

would be to indulge in conjecture as to what would or would not have been the judgment of the Ohio Supreme Court if it had been called upon to exert the discretionary full review vested in it by State law.

An interesting case in this connection is **The Sovereign Camp of the Woodmen of the World v. Neff**, 286 U.S. 549, 52 S.Ct. 501, 76 L.Ed. 1285, in which this Court denied a petition for writ of certiorari to the Kansas City Court of Appeals of Missouri in a Memorandum Decision. (The opinion of the Kansas City Court of Appeals is reported at 48 S.W.2d 564.) The following comments on the case are taken from Robertson and Kirkam, "Jurisdiction of the Supreme Court of the United States", pp. 94, 95 (emphasis supplied):

> "There, a suit involving $2,400 but in which a question arising under the federal Constitution was raised, was brought in a Missouri trial court. The briefs of the parties in the Supreme Court showed that the Missouri courts of appeals had jurisdiction over appeals involving a sum less than $7,500, their decisions in such cases apparently not being subject to appeal; that if, however, a question arising under the federal Constitution was involved, the state supreme court had jurisdiction of the appeal, but the case was taken before it either by direct appeal from the trial court, or by a transfer of the cause from the court of appeals. In the instant case the direct appeal was taken, but the state supreme court transferred the case to the court of appeals, undoubtedly on the ground urged before it by respondent, that, although the federal

question was raised in the pleadings, it was not preserved in the motion for new trial, as required by the settled state practice. After a final judgment by the court of appeals, petitioner applied to the United States Supreme for a writ of certiorari. It was objected by respondent that petitioner had failed to exhaust its remedies below, since the Missouri Supreme Court has the power to review decisions of the lower state courts by certiorari, and petitioner had not applied for such a writ. But the state authorities cited referred only to the power of the state supreme court to issue a common-law writ of certiorari to a court which exceeded its jurisdiction. It is submitted that this argument was untenable. **No decision is known which would indicate that a party litigant must make a collateral attack in a higher court on an otherwise final judgment of the highest court of the state in which a decision could be had before review may be sought in the federal Supreme Court. Cf. Largent v. Texas.** . . . Rather, it would appear that the Supreme Court may have denied certiorari in the Neff case, which was unusually strong on the merits, because, although the judgment of the court of appeals sought to be reviewed was a final judgment of the highest court of the state in which a decision could be had, petitioner had failed to secure a review in the state court of last resort through failure properly to preserve the federal question under the settled state practice. (citations)".

CONCLUSION

No contention is raised by the Petitioners in the case at Bar that the Circuit Court of the Second Judicial Circuit, Florida, had no jurisdiction to act, or that it departed from the essential requirements of law. Petitioners contend simply that the Circuit Court erred in not reversing the Municipal Court of the City of Tallahassee by reason of the Constitutional questions raised in this case and discussed in Petitioner's main brief. The Florida District Court of Appeal could not review the lower court's ruling on these questions and had no discretion to do so. The sole power granted or preserved to the Florida District Courts of Appeal by Certiorari is to determine whether or not the court below exceeded its jurisdiction and whether or not that court departed from the essential requirements of law. The Florida District Court of Appeal cannot use its common law Writ of Certiorari to correct the errors below by a **full review** of the proceedings below. Any effort by Petitioners to secure a Writ of Certiorari from the Florida District Court of Appeal to the Florida Circuit Court would have to be erroneous and unsuccessful. A Writ of Certiorari to be issued by the Supreme Court of the United States must be directed to the Circuit Court of the Second Judicial Circuit in and for Leon County, Florida, the highest state court in which a decision could be had in the instant case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petitioners' Reply Brief has, pursuant to Rule 33 (1) of the Revised Rules of the Supreme Court of the United States, been served by mail upon EDWARD J. HILL, Attorney for Respondent, 216 East Jefferson Street, Tallahassee, Florida, by air mail this _____ day of February, 1963.

_____